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82-1730

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PRESENT TERM 1983

GERALD LEN VOGEL,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED FOR REVIEW

The question presented for review is whether there was probable cause for the search of an automobile behind which Petitioner was standing at the time of his arrest, which was shortly before the search in question. Petitioner contends that there was no probable cause for a search by police officers of the vehicle and its contents. Petitioner further contends that even if such probable cause existed, there were not sufficient exigent circumstances present to allow a warrantless search of such vehicle.

IN THE SUPREME COURT

OF THE UNITED STATES

PRESENT TERM, 1983

GERALD LEN VOGEL

Petitioner

vs.

STATE OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

This petition asks this Honorable Court to review the judgment of the Supreme Court of Alabama, affirming the Court of Criminal Appeals of Alabama, in a case styled Ex Parte: Gerald Len Vogel, Petition For Writ Of Certiorari to the Court of Criminal Appeals (Re: Gerald

Len Vogel, Appellant, vs. State of Alabama, Appellee), and the judgment and opinion of the Alabama Court of Criminal Appeals in Vogel vs. Alabama, reported 415 So.2d 1210. The Alabama Court of Criminal Appeals affirmed, with an opinion, the judgment of the Circuit Court of Montgomery County, Alabama on October 28, 1980, and the Alabama Supreme Court reversed with an opinion, on September 18, 1981. Subsequently, the Supreme Court of Alabama granted rehearing on application of the State of Alabama, and, by order dated July 23, 1982, affirmed the decision of the Court of Criminal Appeals. Petitioner was not advised by the Supreme Court of Alabama of such order until on or about March 3, 1983.

QUESTIONS PRESENTED FOR REVIEW

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LIST OF PARTIES

The only parties to the proceeding in the courts below were Gerald Len Vogel and the State of Alabama.

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REFERENCE TO REPORTS OF OPINIONS OF COURTS BELOW

The final decision of the Supreme Court of Alabama in this case was rendered on July 23, 1982, but was not furnished to Petitioner until on or about March 3, 1983. Its decision has not yet been reported. The decision of the Court of Criminal Appeals of Alabama was rendered October 28, 1980 and has not yet been reported. Copies of the opinions and orders of the Supreme Court of Alabama and the Court of Criminal Appeals of Alabama are included as an Appendix to this Petition.

STATEMENT OF JURISDICTIONAL GROUNDS

The Court of Criminal Appeals of Alabama rendered its decision on October

28, 1980. Application for Rehearing was timely filed and was denied on November 25, 1980. A petition for writ of certiorari was timely filed in the Supreme Court of Alabama and was granted by order dated July 23, 1982, which order also affirmed the ruling of the Court of Criminal Appeals.

Jurisdiction of this case is conferred upon the Supreme Court of the United States by 28 U.S.C.S. Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision which the case involves is the Fourth Amendment to the United States Constitution, which reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by

oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On May 30, 1979, two Montgomery Police Officers, Lindsey and Pilgreen, were on routine patrol when they saw an automobile parked (facing them) on a rural road near the outskirts of the City of Montgomery. The Officers had not received information of any recent burglary and did not use their radio to inquire as to any recent major crime.

As Lindsey and Pilgreen approached the parked vehicle, they saw Petitioner and his brother, Robert Louis Vogel, standing behind the parked car at its trunk, which was opened. Officer Lindsey testified that, as they approached the parked car, he saw "a subject throw a plastic bag down on the ground." Officer

Pilgreen testified that he had an unobstructed view of both sides of the parked car and that he saw nothing thrown on the ground.

Officers Lindsey and Pilgreen observed three army type duffel bags in the back seat of the car. The bags were closed. At the hearing on Petitioner's Motion to Suppress Evidence and to Quash a Search Warrant, Officer Lindsey testified that the outside appearance of the duffel bags indicated that they might contain marijuana bricks. However, although Lindsey testified that he would not call for a property crime investigator in a case involving marijuana, Lindsey did in fact instruct his partner, Pilgreen, to get on the radio and call headquarters for the purpose of having a property crime investigator sent to the scene.

Within twenty minutes after the officers made their initial contact with Petitioner, Property Investigator Jim Nichols arrived on the scene. After he and Officer Lindsey had discussed the situation, Nichols requested permission to look in the trunk of the car. Permission was refused, whereupon additional investigation was conducted by Officer Lindsey and it was decided by the Officers to arrest Petitioner for the offense of littering.

Officer Lindsey admitted that he did not decide to arrest Petitioner for littering when he saw the plastic bag thrown to the ground. Investigator Nichols admitted that the arrest for littering was merely a device to provide an excuse for searching the trunk of the automobile.

The Officers never had any basis

for forming a conclusion with reasonable certainty as to what might be contained in the duffel bags. Lindsey and Nichols discussed the possibility that the duffel bags probably contained either stolen property or marijuana bricks, but there is no evidence that they ever reached any conclusion beyond their speculation. The Officers merely suspected that "some kind of contraband" may be in the car.

When Officer Nichols attempted to look in the trunk of the car pursuant to the littering arrest, Petitioner's brother, Robert Vogel, attempted to stop them from doing so. the Officers were unable to get into the trunk of the car so they then went inside the car and opened the duffel bags, where they found drugs.

Although an attempt was made by the State's witnesses to indicate that

Petitioner Gerald Vogel was not under arrest when the above-described events were taking place (and thus presumably could have taken the automobile and left in it), the testimony of the Officers clearly indicates the Petitioner was under restraint. In fact, he was in handcuffs. Furthermore, the Officers had possession of the keys to the car.

On questioning by the trial judge, Officer Lindsey admitted that he "just suspected" that there might be marijuana in the duffel bags.

Based upon the discovery of drugs inside the duffel bags, the police obtained a search warrant for the automobile. Allegedly acting pursuant to this search warrant, the trunk of the automobile was opened, revealing additional drugs.

It was admitted that the officers

were not looking in the Appellants' automobile for weapons.

Petitioners were indicted by the Montgomery County Grand Jury on June 8, 1979. He pleaded not guilty and filed a Motion to Suppress Evidence and a Motion to Quash Search Warrant.

A hearing was held July 24, 1979, before the trial judge on the Motion to Suppress Evidence and the Motion to Quash Search Warrant. These motions were denied by the trial court.

After the hearing on the above described motions, the case was tried by the court without a jury. Petitioner waived jury trial.

After the non-jury trial, the trial court found Petitioner guilty.

Petitioner gave Notice of Appeal to the Court of Criminal Appeals of Alabama.

On October 28, 1980, the Court of

Criminal Appeals of Alabama reversed Petitioner's conviction for an error in sentencing but held that the search which led to Petitioner's arrest was proper. Application For Rehearing was timely filed and was denied.

A Petition For Writ of Certiorari was filed in the Supreme Court of Alabama, which on September 18, 1981 an opinion reversing the Court of Criminal Appeals on the search question. Subsequently, on applications for rehearing by both parties, the Supreme Court of Alabama withdrew its earlier opinion and held that the search in this case was proper.

FEDERAL QUESTIONS RAISED BELOW

The federal question sought to be reviewed were raised by a Motion To Suppress Evidence and a Motion To Quash Search Warrant filed in the Circuit Court

of Montgomery County on June 22, 1979. Copies of said Motions are set out in the appendix. An evidentiary hearing was held by the trial court on July 24, 1979. At the conclusion of the evidentiary hearing oral arguments were presented to the trial judge, at which cases decided by the Alabama Appellate Courts and by the Supreme Court of the United States were presented in support of Petitioner's position. The trial judge denied said motion.

The same federal question was presented on appeal to the Court of Criminal Appeals of Alabama. The issues here presented were presented in Petitioner's brief to said Court. A copy of Petitioner's Statement of the Issues in said brief is included in the Appendix. The Court of Criminal Appeals rejected Petitioner's argument, as

reflected in its opinion.

The same federal questions were presented to the Supreme Court of Alabama by petition for writ of certiorari. In Petitioner's brief in support of such petition, a Statement of the Issues was included which was identical to that reproduced in of the appendix. The Supreme Court of Alabama also rejected Petitioner's arguments.

ARGUMENT

In United States v. Beck(5th Cir. 1979) 602 F.2d 726, the Fifth Circuit Court of Appeals dealt with a case where law enforcement officers, passing through a predominantly black, high-crime neighborhood, noticed a Chevrolet automobile containing two black males parked on the left side of the road with its engine running. One of the officers knew most of the people in the

neighborhood and testified that these two men were strangers. A store which was subject to robbery or to burglary was located nearby. When the officers approached the occupants of the Chevrolet, they were extremely nervous and engaged in furtive movements, as if something was being passed between them. The Fifth Circuit held that the conduct of the officers constituted a stop of the defendants' vehicle (the same sort of stop that is present in the instant case) and said:

> "in our view the police action here, viewed in the totality of the circumstances, did constitute such a stop. Hence, it was lawfully only if based upon a reasonable suspicion that some criminal activity was afoot. Brown v. Texas, -----U.S. at -----, 99 S. Ct. at 2641. In this case, no such suspicion was present."

The Court went on to observe:

"Spears's mere unfounded

> feeling that something might be afoot did not warrant his stop of the Chevrolet."

In United States v. Frisbie (5th Cir. 1977) 550 F.2d 335, the defendant was arrested during the early morning hours on a highway which was frequently used by persons seeking to bring illegal aliens into the United States from Mexico. His vehicle appeared to be heavily loaded. He did not have a key to the camper on the back of the vehicle. He appeared to be extremely nervous. Twenty-Nine Hundred pounds of marijuana were found in the vehicle. The Fifth Circuit observed:

> "Tested by objective standards, see e.g., Dodd v. Beto, 5 Cir., 1970, 435 F.2d 868, 870 the movements of this van did not give rise to a reasonable belief that criminal activity was afoot. Driving a loaded van with out-of-state plates in the early morning hours, heading west from Fabens toward El Paso, does not create a reasonable inference

of criminal activity. The situation is not, moreover, turned into a basis for probable cause merely because there was a high incidence of smuggling in the area *** It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and silent deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon."

In Barnett v. United States, (5 Cir. 1967) 384 F.2d 848, the Court observed:

"Deputy Fisher testified with laudatory candor that he had no specific idea of what he was

> looking for and that he would have been unable to list the items sought with sufficient specificity to secure a warrant for the search. The search was a general exploratory one made for evidence of a charge as to which the officers had, at the most, mere suspicion."

One simple question seems to be a valid test of whether or not proable cause exists. It is: Could the officer, in applying for a search warrant, have told the magistrate what he expected to find in the area to be searched? If he can, probable cause may exist. If he cannot, probable cause definitely does not exist.

Here, had Officers Lindsey, Pilgreen, and Nichols been applying for a search warrant, they could not have told the issuing magistrate what they were looking for. They just "suspected." They suspected that "some kind of (unidentified) contraband" might be in

the vehicle. They discussed between themselves the possibility that the duffel bags within the car contained either stolen property or marijuana bricks, but they never reached any probable cause conclusion as to which, if either, of those illicit substances might be contained therein.

Under these circumstances, there was no probable cause to search the vehicle by which Appellants were found.

The State of Alabama has argued before the Appellate Courts of Alabama that this case is controlled by Chambers v. Maroney, 399 U.S. 42, ____ S.Ct. ____ _____ L.Ed.2d ____. We submit, however, that there is one important element of probable cause which was present in Chambers and not present here - in Chambers, the police had been alerted that a robbery had just been committed by

a perpetrator wearing a green sweater and occupying a blue compact station wagon. Thus, they knew what to look for. In this case, with no report of a crime, the police just saw two men standing behind a vehicle on a public road.

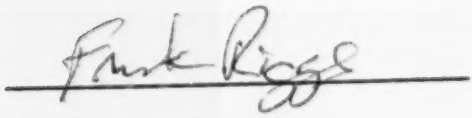
In United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623, this Court observed, at 45 L.Ed.2d 629:

> "This degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search. Almeida-Sanchez, 413 U.S. at 269-270, 37 L.Ed.2d 596, 93 S.Ct. 2535; Chambers v. Maroney, 399 U.S. 42, 51, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970).

CONCLUSION

For the reasons stated above, Petitioner prays that the writ applied for be granted.

Respectfully submitted,



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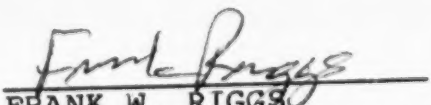
CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition upon Honorable Charrles Graddick, Attorney General, State of Alabama, 250 Administration Building, Montgomery, Alabama 36104, by mailing a copy of same to him, postage prepaid, this ____ day of April, 1983.



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APPENDIX

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THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1980-81

3 Div. 146

Gerald Len Vogel
and
Robert Louis Vogel

v

State

Appeal from Montgomery Circuit Court

TYSON, JUDGE

Gerald Len Vogel and Robert Louis Vogel were each indicted in Montgomery County for fourteen counts of violating the Alabama Uniform Controlled Substances Act

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by being in possession of a number of different controlled substances seized by Montgomery police officers from the Vogels' car on May 30, 1979. §20-2-70(a), Code of Alabama 1975. Because of the identical nature of the facts and issues, the two defendants agreed that their cases be consolidated for trial, and further waived a trial by jury, instead submitting their combined cases to the trial court for determination. Both defendants were found to be guilty as charged by the trial court with respect to eleven of the fourteen counts, and the court granted the State's motion to nol pros the remaining three counts as to each defendant. The court sentenced Gerald Vogel to consecutive terms of fifteen and five years imprisonment on the first two counts respectively, and imposed fifteen year terms for each of the remaining counts, to run concurrently with

the initial consecutive terms. Robert Vogel was sentenced to three fifteen and one five year term, to be served consecutively, on the first four counts of his indictment, and to fifteen year terms for each of the remaining counts, to be served concurrently with the consecutive sentences. From such judgments and sentences, both Vogels now prosecute this appeal.

Initially, the trial court received evidence on appellants' motion to suppress the evidence of the drugs seized from the car, but appellants later agreed that the trial court consider such evidence in its determination of appellants' guilt or innocence. The first witness for the State was Officer L of the Montgomery Police Department, who testified that, on the morning of May 30, 1979, he and Officer P had been on routine patrol in their marked police vehicle on Narrow Lane

Road south of Montgomery's Southern By-Pass. At approximately 10:00 o'clock, the officers turned onto Allenport Road, a dirt "circular type road" which intersects Narrow Lane Road in two places and apparently runs back to an abandoned or seldom used airstrip. Officer L described the area as somewhat rural and sparsely populated, with only a few houses and Conway Lumber Company in the immediate vicinity; it further appears that there were no inhabited structures along Allenport Road itself. As they drove down Allenport Road, Officer L stated, he noticed through some trees that an automobile was parked on a branch road leading to the airstrip. Officer L testified that he then turned the police car onto the branch road and drove toward the parked car and that as he did so, he saw "a subject throw a plastic bag down on the ground" (R. 10), and a second individual

standing at the rear of the car with the trunk open. The officer stated that he had on several prior occasions run across persons "hunting squirrel out of season", "love making," "drinking beer," and the like (R. 9), and thus he stopped the police car, got out and approached the parked car. As he did so, he witnessed two individuals "appearing to fumble with something in the trunk," at which point Gerald Vogel walked around to the front of the car and Robert Vogel "slammed" the trunk lid shut "as if . . . [to] get it closed before we got back there" (R. 11). Upon questioning, one of the pair stated that they were there to dump some trash, despite the posted sign prohibiting dumping, but would not do so now that the officers were there. Officer L testified that he glanced around the car; but that he saw no trash other than the

plastic bag, so he asked Robert Vogel if he could look in the trunk, a request refused by Vogel. The officer stated that, after procuring identification from the two, and recognizing Robert Vogel's name from prior police contacts, and upon again being refused permission to examine the trunk, he told Officer P to radio for an investigator. Several minutes later, Investigator N arrived, and Officer L stated that he informed N of the situation; Robert Vogel again denied the officers permission to look in the trunk, stating that they would have to get a search warrant to do so. During this colloquy, Officer L testified, Gerald Vogel acted "fairly normal," while Robert was "extremely nervous" and "sweating heavily" and attempted to remain at or near the trunk at all times (R. 17).

Officer L then testified that,

prior to the arrival of Investigator N, he looked into the interior the the car and saw three "Army type duffel bags" stuffed with "brick" shaped objects lying on the back seat, and a police scanner and walkie-talkie in the front seat area. After N arrived, Officer L stated that he examined the plastic bag which had been discarded and was lying on the ground, and deduced from the affixed price tag that it might have come from Conway Lumber Company, a store located at one intersection of Allenport and Narrow Lane Roads. Leaving P, N and the two appellants, Officer L drove to Conway and showed an employee the plastic bag, and, according to L , the employee stated that two white males driving a gold car had earlier entered the store at two different times and purchased duffel bags. The employee placed the

times of these visits to have been within thirty minutes of the officer's visit, and identified the bags as three plain and two camouflaged canvas duffel bags. The two males had then driven down Allenport Road toward the airstrip. Officer L then testified that he returned with this information to the scene of the parked car and talked with N , and both decided that Robert Vogel would be arrested for littering. After doing this, the officers attempted to open the trunk to look for "the trash that would have been involved with the bag that we found" (R. 21), but Robert Vogel resisted their attempts and finally was handcuffed. Robert Vogel continued to interfere by blocking access to the trunk, according to Officer L , so he was placed in the back of the police car; from there he escaped and returned to the trunk of his

car, and removed the keys from the trunk lock. Officer L testified that he located the keys behind the back seat of the police car, but Robert Vogel had rendered them unusable, and the trunk could not then be opened. During all of this, L stated, Gerald Vogel had not been placed under arrest.

At this point, L and N entered the car and removed the duffel bags, and upon opening them discovered the controlled substances. Both Vogels were then transported to the police station, and the car towed there by a wrecker. Officer L stated that, at the time, he thought that the bags contained marijuana bricks because of the rectangular imprints, but that in any event he "knew there was something wrong" (R. 27). Under questioning from the court, Officer L stated that he did not believe that appellants

had purchased several "seven or eight dollar" duffel bags "to put old trash in to throw out on the ground" (R. 31). He also stated that, from his police experience, he knew generally what a brick of compressed marijuana looked like. Officer L then testified that he and Officer N executed affidavits and secured a search warrant from the trunk of the car He also identified a number of photographs of the scene and the car, and identified the plastic bag he had picked up.

On the cross-examination by counsel for appellants, Officer L acknowledged that, at the time he had had no reports or any burglaries or robberies in the area, but that he did not remember telling Officer P to radio for a property crimes investigator. He further stated that he did not remember calling the plastic bag to the attention

of Officer P as they approached appellants' car, although he reiterated that he had definitely seen Robert Vogel toss the bag onto the ground. Officer L testified that he only mentioned the bag to the Vogels some twenty minutes after he first talked to them in connection with Robert's arrest for littering. He further stated that he summoned Investigator N for "investigative advice" in regard to the car, but that he did not know that N was a property crimes investigator.

Officer L further stated under questioning from the court that he knew of Robert Vogel's past brushes with the law involving buying, receiving and concealing stolen property, and drugs. He also stated that he was familiar from his training with the use of isolated airstrips as a "way out for contraband" (R. 61).

On re-direct examination, the officer testified that he knew that appellants had purchased five bags, but that only three were visible inside the car. On re-cross, he acknowledged that neither appellant had told him that the bags contained trash.

Montgomery Police Investigator N testified that, on May 30, 1979, he had been summoned by radio to the Allenport Road area and that, upon arrival, he had occassion to see appellants, as well as Officers L and P. He stated that, upon looking into the parked car at the scene, he saw a police scanner and three duffel bags filled with rectangular objects. Further, Investigator N said, he asked Robert Vogel for permission to look into the trunk, which permission was denied by Vogel, who told N to get a search warrant. At that point, Officer L showed N the

plastic bag, and then left the scene to go to Conway Lumber Company. Investigator N stated that, during this time, Robert Vogel was extremely nervous and paced about. Upon L's return from Conway, Robert Vogel was placed under arrest for littering, and the keys to the car removed from his pocket. Investigator N further stated that he had formed an opinion that the bags in the back seat area contained "kilo bricks of marijuana" (R. 74), although the possibility of stolen property was discussed as well with Officer L . As he attempted to open the trunk of the car, N stated, Robert Vogel began interfering and was handcuffed after a struggle; he then knocked N down and had to be subdued by N and L, who placed him in the police car. From there, Vogel escaped, was subdued and

returned to the car, at which point Investigator N discovered the key to be missing from the Vogels' car trunk lock. Investigator N testified that Officer L then located the keys in the police car, but they were unusable. He further stated that at no time did he know where the ignition key to the car was, and to his knowledge the Vogels' car was operational. Investigator N and Officer L then entered the car and discovered the drugs, then placed both Vogels under arrest, advising them of their rights at that time. Investigator N further testified that he was familiar with Robert Vogel's name as one having been involved in drug dealings.

On cross-examination, Investigator N stated that he thought that Officer P had handcuffed Gerald Vogel

during the struggle with Robert Vogel, though Gerald was not formally arrested until the drugs were discovered. N reiterated that he though that the bags contained marijuana bricks, based upon his experience and the reputation of Robert Vogel. He also stated that Officer L had not told him at the scene that he had seen Robert Vogel throw down the plastic bag, but that he had reached that conclusion after seeing the bag on the ground. Investigator N further testified that he and Officer L had told him that Robert had been involved with stolen property on a prior occasion. The two officers further discussed whether the duffel bags contained stolen property or marijuana bricks. and then L arrested Robert for littering. Investigator N further stated that, though Gerald Vogel was not under arrest

during all of this, he was not told by N that he was free to leave.

On re-direct examination, the officer stated that he had been afraid at one point that either or both of the Vogels might attempt to escape. He also testified that, in his police experience, he had been involved in narcotics work and had participated in arrests and searches involving vehicles and airplanes. He stated that he was familiar with the methods of packaging drugs and what such packaging looked like, and further that private isolated airports were frequently used to smuggle such contraband. He also described the area around the Allenport airstrip as secluded and heavily wooded.

At this point, the State rested on the motion to exclude, and Officer Scott P was called by the defense. Officer P testified that he had been working

with Officer L on May 30, 1979, when Officer L pointed out a parked car on Allenport Road. As they approached, Officer P stated, he could see appellants "shuffling some stuff around in the trunk of the car" (R. 110), but he did not see either one throw down any litter, nor did Officer L mention such an occurrence to him. Officer P stated that he did not know of the plastic bag until after Investigator N had arrived and Officer L showed him the bag. The officer further testified that Officer L told him to radio for a property investigator, although he did not know why. Officer P also stated that he witnessed the scuffle between Robert Vogel and Officers N and L , and that he kept an eye on Gerald Vogel, who the officer stated was not free to leave; he then

handcuffed Gerald Vogel to prevent him from entering the affray, although Gerald was not under formal arrest.

On cross-examination by the State, Officer P stated that he had no intention of arresting Gerald Vogel before the drugs were found, but that he did not know whether Gerald Vogel had access to an ignition key for the car. He further stated that, when the officers had first approached the parked car, Gerald Vogel had come forward to meet them and Robert had stayed at the trunk and had then slammed it shut. The officer also stated that Robert Vogel grew increasingly nervous as time went by, and refused to allow anyone to examine the interior of the trunk, saying that there was only "trash" in the trunk. He further stated that he continued to watch Gerald Vogel, because he did not know whether he would

run or assault him. Officer P also testified that, though he had seen the duffel bags, he did not have "any idea" what they contained.

C. D. Sherlin was called by the defense, and testified that, though he was now an investigator with the Attorney General's Office, he had earlier been employed as a major with the Montgomery Police Department, as head of the investigation division. Mr. Sherlin stated that he was familiar with Officer L through the Police Department and that he would trust L. He further stated that he considered Officer L to have a good reputation, but that he was familiar with an incident where L had lied in connection with the loss of police property. Further attempts by the defense to develop this line of inquiry were objected to by the State, which

objections were sustained by the court.

Charles Swindall, Chief of Police of Montgomery, testified for the defense that he was familiar with Officer L , and that his overall reputation was good, with the exception of one incident. Chief Swindall stated that he was familiar with an incident where L had falsified a report, but further questioning was also objected to and the objections sustained.

James D. Foster, a lieutenant in the same department, testified that he was acquainted with Officer L, and that L had a favorable reputation for truth and veracity. Lieutenant Foster further stated that the had talked with L at the scene of the Vogels' arrest on May 30, 1979, and that L had mentioned that he had observed one of the Vogels throw some litter on the

ground. Lieutenant Foster further testified that he had called a press conference after the events of May 30, and thought that he had told representatives of the news media about the littering aspect of the case. He did not know whether the littering had been mentioned in the police report.

Officer N was recalled at this point as an adverse witness, but the court disallowed questioning as to whether the police reports contained mention of the littering.

Norman Lumpkin, a television news reporter employed by WSFA television in Montgomery, testified for the defense that he had attended a news conference on the day that the Vogels were arrested at Police Headquarters, and that, to his knowledge, nothing had been said at the new conference about any littering by the Vogels.

Rhodes Johnston, a police reporter for the Alabama Journal newspaper, testified for the defense that he did not attend the news conference at Police Headquarters that day, and was excused. At this point, the defense rested on the motion to suppress, and arguments were made by both the State and the defense, after which the trial court denied the motion to suppress because it determined that "probable cause" and "exigent circumstances" existed to justify the officers' actions (R. 169). The defense having agreed that the trial court could consider the evidence presented during the suppression hearing as evidence on the question of guilt, the State then called several more witnesses.

Michael Wilson, a vice and narcotics officer with the Montgomery Police Department, testified that, on the morning

of May 30, 1979, he had been summoned by radio to the Allenport Road, and, upon arrival talked to Officer L . Officer Wilson stated that he "kept watch" over a car parked at the scene, and later followed the car as it was towed by wrecker to the Police Station; he then stayed with the car until a search warrant was obtained. The officer further testified that he remained with the vehicle at all times until he turned over his control to an Officer Totty, and that no one entered the vehicle while he was watching it.

Under cross-examination, the officer stated that, though he did not think any one had entered the car, he could not "swear" that it had not been entered.

On re-direct examination, Officer Wilson identified the appellant as the two individuals who had been under arrest

when he had arrived at the Allenport Road scene.

T. G. Totty, a senior evidence technician with the Montgomery Police Department, stated that, as part of his job, he collected and photographed all physical evidence relating to crimes investigated by the Police Department. He testified that, on May 30, 1979, he had been advised that a car requiring processing would be towed into Police Headquarters. Corporal Totty further testified that, when the car arrived, "every supervisor that was in that building was standing there" (R. 179), but that he did not specifically remember seeing Mike Wilson. The officer stated that one of the appellants was then brought to where the car was parked and read the contents of a search warrant, after which a locksmith opened the trunk of the car.

Upon the opening of the trunk, Corporal Totty testified, he saw "loose drugs" and "all kinds of paraphernalia" (R. 181) lying in the trunk. The evidence from the trunk, as well as from the back seat, was labeled and transported to the technicians' section. Because of the amount of evidence involved, Corporal Totty stated that it was placed into a safe and sealed shut until the next morning, when the inventorying process was begun. Corporal Totty further testified as to the chain of custody followed between the inventory and the time of trial, and further stated that Allen Adair of the Toxocologist's Office had taken samples of all of the drugs for analysis.

Allen Adair, a criminalist with the State Department of Forensic Sciences, Montgomery Division, after testifying as to his qualifications and experience in

testing drugs, stated that he had removed representative samples of various types of drugs from the drugs removed from the Vlgels' automobile. He further testified as to the chain of custody over the samples, and stated that he had analyzed the samples. The witness identified the various samples as containing cocaine, codeine (methyl-morphine), alphaprodine, amphetamine, methadone, pethidine, morphine, phenmetrazine, ethylmorphine, methyqualone, oxymorphone, and hydramorphone. He did not identify any drugs containing ambarbital and secobarbital, opium, or preparation of opium, and the respective counts of the indictments relating to those drugs were nol prossed.

Investigator N was recaled by the State, and testified that appellants were the individuals present at the scene on Allenport Road on May 30, 1979.

The various drugs identified by Mr. Adair were received into evidence, at which point the State rested. No further witnesses were called by appellants, and neither of them testified at trial.

I

It is the first contention of the appellants that the trial court committed reversible error in overruling their motion to suppress the evidence of the drugs seized from the back seat and trunk of their automobile by Montgomery police officers. To this end, appellants assert that the initial and concededly warrantless search of the interior of the vehicle while it was parked on Allenport Road, which search revealed numerous cartons of drugs concealed in three duffel bags on the back seat, was unconstitutional under the Fourth Amendment's proscription against unreasonable searches and seizures.

If appellants are correct in their argument, then admittedly the drugs seized from the car's trunk pursuant to a later-acquired search warrant [which, appellants concede, was based upon probable cause arising "out of matters observed during the initial warrantless earch"] must likewise be suppressed as "fruit of the poisonous tree." Silverthorne Lumber Company v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L. Ed.2d 441 (1963); Duncan v. State, 278 Ala. 145, 176 So.2d 840 (1965).

In dealing with police activity within the ambit of the Fourth Amendment, we are mindful that "'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few

specifically established and well-delineated exceptions,'" Mincey vs. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57L.Ed.2d 290 (1978), quoting Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967), which "exceptions" are generally recognized to be plain view, consent, incident to a lawful arrest, in hot pursuit or similar emergency situations, under probable cause coupled with exigent circumstances, and in stop and frisk situations. Daniels v. State, 290 Ala. 316, 276 So.2d 441 (1973); Richardson v. State, Ala.Cr.App., 376 So. 2d 205 (1978), affirmed, Ala., 376 So.2d 228 (1979); Baker vs. State, Ala. CrApp., 340 So.2d 854, cert. denied, Ala., 340 So.2d 860 (1976). A seventh "exception" is now recognized as well in instances of "inventory" searches made to secure valuables or similar items. South Dakota v Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49L.Ed.2d

1000 (1976); Wilkinson v. State, Ala., 374 So.2d 400 (1979). Appellants, however, while apparently acknowledging these exceptions to the warrant requirement, nevertheless argue that the situation here presented does not properly fit any of the above-stated categories and that, in any event, none of the exceptions would justify a warrantless search of the duffel bags contained in the interior of the car.

Initially, appellants seem to contend that Officers Lindsey and Pilgreen had no legitimate reason to stop their patrol vehicle and investigate the activities of appellants on the Allenport Road that morning, citing in support of this proposition United States v. Beck, 602 F. 2d 726 (5th Cir. 1979). In Beck, the Fifth Circuit held that the mere fact that two men were sitting in a parked car with its engine running on a midsummer's day

in a housing project wqs "not inherently suspicious" and thus the "mere unfounded feeling that something might be afoot" was no justification for even an investigatory stop by the police, which stop had eventually culminated in defendant's arrest. It is, of course, well recognized, and so acknowledged in Beck, that police may constitutionally detain an individual for brief periods of questioning "on a reasonable suspicion based on objective facts, that the individual is involved in criminal activity." Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 889 (1968); §15-5-30, et seq., Code of Alabama 1975; Fennell v. State, 51 Ala.App. 23, 282 So.2d 373, cert. denied, 291 Ala. 778, 282 So.2d 379 (1973). The standard of "reasonable suspicion" employed in such instances will, because of the minimally intrusive nature of the procedure

contemplated, justify such a limited stop upon facts which demonstrate something less than full probable cause. Bagony v. City of Birmingham, Ala.Cr.App., 371 So.2d 80 (1979); Luker vs. State, Ala.Cr.App., 358 So.2d 504 (1978).

From our examination of the record, we conclude that though, in a sense, appellants were in fact stopped or "seized" within the scope of Terry v. Ohio, supra, by virtue of the appearance that they were "not free to ignore the officer(s) and proceed on [their] way," United States v. Pope, 561 F.2d 663 (6th Cir. 1977), there were present here, unlike in Beck, specific and articulable facts which could give rise to a "reasonable suspicion" that appellants were engaging in criminal mischief. Briefly, two officers on routine patrol encounter a car parked in the middle of a road leading to an isolated airstrip, and it is

evident that two men are fumbling around in the opened trunk of the car. Officer L testified that he had, on several prior occasions, apprehended individuals for violation of various laws at that particular site. Here, Officer L stated that he actually saw one of the appellants discard a plastic bag onto the ground by the car, despite the posted signs prohibiting "trash dumping" and the laws designating littering as a violation. §23-5-5, Code of Alabama 1975; Montgomery, Ala., Code §39-4. The fact of littering alone, as a misdemeanor committed in the officers' presence, would justify the officers in stopping and investigating this action, and even arresting the offender if they thought that course of action necessary. §15-10-3, Code of Alabama 1975. We find that the officers merely stopped their car and

questioned appellants as to their activities, a minimally intrusive procedure under these circumstances, and indeed "it would have been poor police work . . . to have failed to investigate this behavior further." Terry v. Ohio, supra. There was nothing impermissible about the course of action pursued by the officers.[1]

Given the propriety of the officers' action in initiating their somewhat cursory investigation of appellants' behavior, appellants still argue that the resulting search and seizure which netted the three duffel bags stuffed with cartons of drugs and thus provided the probable

1. Cf., United States v. Mendenhall, 446 U.S. __, 100 S.Ct. 1870, 64 L.Ed. 2d 497 (1980), where, while resting its decision on principles of consent, the Supreme Court appears to have recognized investigatory stops of persons displaying conduct "which appeared to the agents to be characteristic of persons unlawfully carrying narcotics."

cause for the later-acquired warrant to search the trunk was made without probable cause and in the absence of any exigent circumstances. Initially, it is obvious from the unrebutted testimony of the officers involved and the photographs received into evidence at the hearing that the duffel bags were plainly visible through the windows of the car when the officers approached, and that at no time were the officers required to open the car doors or perform such actions in order to actually see the bags. In the context of the Fourth Amendment, "a 'search' implies probing into secret places for that which is hidden [and] implies force, actual or constructive, or a forceable dispossession of property of one by exploratory acts." Cunningham v. State, 52 Ala.App. 440, 293 So.2d 865 (1974); Knox v. State, 50 Ala. App. 494, 280 So.2d 200 (1973). Clearly,

the discovery of these bags, lying as they were on the back seat of a car parked on a public road and in the obvious view of anyone who happened to pass by, was not the product of any "search" by the officers. Vincent v. State, 284 Ala. 242, 224 So.2d 601 (1969); Butler v. State, Ala.Cr.App. 380 So.2d 381 (1980); Packer v. State, 55 Ala.App. 30, 312 So. 2d 601 (1975); Osner v. State, 54 Ala.App. 520, 310 So.2d 241 (1974), cert. denied, 293 Ala. 769, 310 So. 2d 247, cert. denied, 423 U.S. 871, 96 S.Ct. 137, 46 L.Ed.2d 101 (1975); Powers v. State, 49 Ala. App. 690, 275 So2d 369 (1973); Marshall v. United States, 422 F. 2d 185 (5th Cir. 1970).

Although we are of the opinion that, from the facts, no "search" occurred relative to the discovery of the three duffel bags, we are still confronted with the question as to whether the officers

then had the legitimate right to enter the vehicle, seize the bags, open them and confiscate the drugs. Despite language in Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968), that "objects falling in the plain view of an officer who has a right to be in the position to have the view are subject to seizure," we find that such seizures must be governed by the subsequent decision of Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In that case, the Supreme Court had occasion to consider seizures of items found inadvertently in "plain view" during searches pursuant to some prior legitimate intrusion [such as under the color of a warrant or in "hot pursuit"], technically inapposite to the present case in that we have determined that no "search" or initial prior intrusion in fact occurred, see Scales v. State, 13

Md.App. 474, 284 A.2d 45 (1971). The Court did, however, set forth the following tenent regarding the seizure of such evidence, "whether contraband or stolen goods or objects dangerous in themselves," applicable in circumstances such as these:

> ". . . plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle * * * that no amount of probable cause can justify a warrantless earch or seizure absent 'extigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure."

Compare Taylor v. United States, 286 U.S. 1, 52 S.Ct. 466, 76 L.Ed. 951 (1932) [warrantless entry to seize evidence in open view unconstitutional]; with Steele v. United States, 267 U.S. 498, 45 S.Ct. 414, 69 L.Ed.

757 (1925) [evidence in open view could furnish probable cause for issuance of warrant]. We thus must determine first whether there existed probable cause to justify the seizure of the bags, and then whether there existed exigent circumstances to excuse the requirement of a search warrant.

The fact that an automobile is involved does not excuse the basic requirement that there be a full measure of probable cause in order to support a warrantless search:

> ". . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

Carroll v. United States, 267 U.S. 132 45 S.Ct. 280, 69 L.Ed. 543 (1925). See

Paschal v. State, Ala., 365 So2d 681 (1978); Landry v. State, 56 Ala. App. 421, 121 So. 2d 759 (1975); Garsed v. State, 51 Ala.App. 622, 288 So.2d 161 (1973); Owens v. State, 51 Ala.App. 50, 282 So.2d 402, cert. denied, 291 Ala. 794, 282 So.2d 417 (1973). The concept of "probable cause" has often been explored by the courts, and in Wright v. State, Ala.Cr.App. 343 So.2d 795, cert. denied, Ala., 343 So.2d 801 (1977), the following is found:

> "'In dealing with probable cause... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed, 1879 (1949). Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense had been or is being committed. Carroll v. United

> States, [supra]. 'The substance of all the definitions [of probable cause] is a reasonable ground for belief of guilt.' McCarthy v. DeArmit, 99 Pa.63, quoted with approval in Carroll, supra . . ."

To this end, mere suspicion standing alone is never a sufficient basis for the finding of probable cause, Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949), and Eaton v. States, 45 Ala.App. 464, 231 So.2d 918 (1970), nor will an otherwise illegal search or seizure be made justifiable by what it turns up. Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), Shipman v. State, 291 Ala. 484, 282 So.2d 700 (1973), and Rudolph v. State, Ala.Cr.App., 371 So.2d 962, cert. denied, Ala., 371 So.2d 965 (1979). Appellants assert that the circumstances here presented do not indicate the requisite measure of probable cause to support the belief that the duffel bags concealed the evidence or

fruits of criminal activity. We disagree, and set forth below in a somewhat condensed fashion what we consider to be the relevant facts as based upon the testimony at the suppression hearing:

1) Officers L and P, while on routine patrol on a dirt road in a rural area, unexpectedly come upon a car parked in the middle of a branch road leading directly to an abandoned, or at least seldom used, airstrip.

2) The trunk lid of the car is up, and the officers can see two men, identified as appellants, fumbling around in the trunk. Officer L sees one of the men discard a plastic bag onto the ground beside the car, and the two officers decide to investigate.

3) As the officers approach, one of the men, Robert Vogel, hurriedly slams the trunk lid closed as if to prevent the officers from looking into the trunk.

4) Upon questioning, one of the men admits that they were there to dump trash despite the posted signs prohibiting this, but will not do so now since the officers are present. Robert Vogel refuses the officers' request to allow them to examine the trunk, saying first that the trunk

only contains trash, and then denying that there is anything in the trunk.

5) Three green, apparently new, duffel bags stuffed with "brick" shaped objects are visible on the back seat, as is a police scanner and walkie-talkie in the front of the car.

6) The officers summon Investigator N and when he arrives Robert Vogel persists in his refusal to allow the opening of the trunk. He is extremely nervous and attempts to remain at all times near the trunk. At several points he physically interferes with the officers' attempts to open the trunk, escaping confinement from the police car in one instance to do so. He succeeds in breaking the keys, frustrating the officers' attempts to enter the trunk.

7) A check of the discarded bag reveals that the Vogels have within thirty minutes purchased five new duffel bags from a nearby store. Only the three are visible.

8) Officers L and N agree that the three duffel bags and possibly the trunk contain either stolen property or marijuana bricks, and apparently settle on marijuana because of the "brick" shaped imprints on the bags. Both are familiar with Robert Vogel's prior experiences with the law concerning

stolen property and narcotics.

9) Both officers are familiar for their training with the use of isolated airstrips in operations involving the disposal or receipt of contraband. The Vogels' car is parked some forty feet from the entrance to the field, though a cable stands between the car and field.

10) Both officers are suspicious of the trash story given the new bags, in that it seems implausible that new duffel bags would be purchased for the dumping of trash.

While considered separately, any one of these occurrences might not, in itself, furnish the requisite probable cause for believing that appellants were engaging in some criminal activity and that the three duffel bags were concealing evidence of that activity, we are of the opinion that, when taken together, these events strongly indicated that appellants were involved in illegal activity. Several factors compel this conclusion.

Initially, we note that, while the

probable cause standard is ostensibly an objective one, we agree that "actions and things observed by an experienced law enforcement officer may have more significance to him in determining whether the law is being violated at a given time and place than they would have to a layman." United States v. McClard, 333 F.Suppl. 158 (E.D. Ark, 1971); thus, "what constitutes 'probable cause' . . . must be determined from the standpoint of the officer, with his skills and knowledge, rather than from the standpoint of an average citizen under similar circumstances." People v. Symmonds, 18 Ill.App.3d 587, 310 N.E.2d 208 (1974). See United States v. Ortize, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); Terry v. Ohio, supra; Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed.

436 (1948); State v. Harris, 256 Wis. 93, 39 N.W.2d 912 (1949); In re Jones, 264 S.C. 286, 214 S.E.2d 816 (1975). In the instant case, both Officer L and Investigator N testified that, from their training and experience, the imprints evident on the three duffel bags were of a size and shape consistent with compressed bricks of marijuana, although Officer L did at one time suspect stolen property. The officers' beliefs based upon their experiences were properly considered in determining probable cause. In this regard, this case is strikingly similar to the facts in United States v. Worthington, 544 F.2d 1275 (5th Cir.), cert. denied, 434 U.S. 817, 98 S.Ct. 55, 54 L.Ed. 2d 72 (1977), where "gunny sacks containing brick-like objects" were involved.

Similarly, we cannot ignore the obvious fact that appellants were engaging

in their activities on a rural road a short distance from a somewhat remote airfield. Officers L and N also were familiar from their training with the use of such airstrips in operations involving contraband. We feel that such a consideration was relevant under the circumstances, and analagous with those decisions allowing examination of the "character" of the neighborhood when evaluating the actions of individuals. Cf., United States v. Davis, 561 F.2d 1014 (D.C.Cir.), cert. denied, 434 U.S. 929, 98 S.Ct. 416, 54 L. Ed.2d 290 (1977) [area of high narcotics activity]; Commonwealth v. Holloway, 229 Pa.Sup. 128, 323 A.2d 216 (1974) ["high burglary neighborhood"]; Smith v. Swenson, 328 F.Supp. 747 (W.D.Mo. 1971) [black in an all-white neighborhood]. And see, Carroll v. United States, supra.

It is recognized that "deliberately

furtive actions * * * at the approach of strangers or law officers are strong indicia of mens rea," Sibron v. New York, supra, and in this regard we note the actions of appellants, notably Robert Vogel, in "hurriedly" slamming the trunk lid shut, remaining at or near the trunk, and resisting all efforts to open it, sometimes violently. While the mere fact of closing the trunk alone is capable of many innocent connotations, when seen in the light of the accompanying actions, a high degree of suspicion attaches. Cf., Daniels v. State, supra [passenger of stopped car tossed box onto back ledge at approach of police], and cases therein cited; People v. Superior Court of Yolo County, 3 Cal.3d 807, 91 Cal. Rptr. 729, 478 P.2d 449 (1970) [mere gesture toward seat or floor not sufficient in itself], and cases therein cited; Annot., 45 A.L.R.3d 581 (1972).

In response to what we consider to have been reasonable questioning under the circumstances, appellants variously told the officers that they were dumping trash, a story rendered somewhat implausible by the presence of recently purchased duffel bags. Robert Vogel vacillated between his assertion that there was only trash in the trunk, and that there was nothing in the trunk, all the while refusing the officers permission to examine the car. Evasive and conflicting answers to reasonable police questioning, and implausible explanations of suspicious behavior may, when considered with other factors, furnish probable cause. United States ex. rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir.), cert. denied, 421 U.S. 1016, 95 S.Ct. 2424, 44 L.Ed.2d 685 (1975); Hooks v. State of Oklahoma, 394 F.Supp. 1262 (W.D. Okla. 1975); State v. Lee, 302 Minn. 382, 225 N.W.2d 14

(1974); State v. Cavazos, 18 Or.App. 197, 524 P.2d 546 (1974).

Finally, both officers were familiar with Robert Vogel's prior criminal experiences involving stolen property and narcotics, certainly highly relevant in this instance. Robinson v. State, Ala.Cr. App., 361 So.2d 379, cert. denied, Ala., 361 So.2d 383 (1978); Hatton v. State, Ala. Cr.App., 359 So2d 822, writ quashed, Ala., 359 So.2d 832 (1977).

We hold that the circumstances and factors examined above establish that ample probable cause existed to justify the officers in believing that appellants were concealing contraband in the plainly visible duffel bags. In Shipman v. State, 291 Ala. 484, 282 So.2d 700 (1973), our Supreme Court held that for an item in plain view to be validly seized "the officer must possess some judgment at the time that the object to be seized is contraband and that

judgment must be based upon probable cause." Because we find that here the officers did have such probable cause, we distinguish the decisions of the Supreme Court in Shipman and in Kinard v. State, Ala., 335 So.2d 927 (1976), wherein seizures of "white powder" and "pink pills" were invalidated because the officers possessed no knowledge that the items were contraband. We have examined the cases cited to us by appellants on the issue of probable cause, and determine that the statement "two cases are seldom sufficiently alike for the first to be an absolute binding precedent for the second." Arrington v. United States, 311 A.2d 838 (D.C.App. 1973), is particularly appropriate.

The second determination to be made is whether exigent circumstances existed to justify executing the seizure then and there, or in the absence thereof, whether a warrant should have been obtained first. Although

"[T]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears," Coolidge v. New Hampshire, supra, it is apparent that automobiles and other "movables" have long been afforded somewhat different treatment in the context of the Fourth Amendment:

> ". . . [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

Here, however, appellants assert that, since both of them were under arrest [which is cast in doubt by the record], and there were plenty of police officers around to

see that the car was guarded, no exigencies in respect to mobility existed, and thus there was no plausible excuse for the failure to secure a warrant. Our Supreme Court recently rejected such an argument in the decision of Ex parte State [Re: Reid v. State], Ala., ____So.2d ____ [Ms. June 6, 1980], relying on Chambers v. Maroney, 399 U.S. 42, 90 S. Ct., 1975, 25 L.Ed. 2d 419 (1970), wherein it was stated:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

We find this language applicable here, and additionally note that, though Robert Vogel was under arrest for littering, Gerald Vogel had not been arrested at the time of the seizure [though he was handcuffed at one point to prevent him from

aiding Robert in his affray with the officers] and was, at least theoretically, free to leave. Cf., Daniels v. State, supra. It is thus clear that given the probable cause to believe that the bags contained contraband, the officers were entitled to enter the vehicle and seize the bags.

Appellants further argue, however, that the opening of the duffel bags at the scene was improper in that no exceptions to the warrant requirement purport to allow "the right to search luggage (such as duffel bags) there in or the closed and locked trunk of the vehicle." Appellants only cite State v. Patino, 163 N.J.Super. 116, 394 A.2d 365 (1978), for support in this rather broad statement, but we find that, while Patino can be read for the proposition that probable cause to search the interior of a car does not necessarily extend to other areas, such as the trunk, the situation here

did not involve a warrantless earch of the trunk (a warrant was later obtained and the trunk opened at the police station.) Our only concern is thus whether the officers were justified in opening the bags on the spot instead of returning them to the police station to await a warrant (Cf., Bassett v. State, 49 Ala.App. 733, 275 So. 2d 713 (1972), reversed, 290 Ala. 259, 275 So.2d 720 (1973).

The United States Supreme Court has recognized that, because they are "intended as a repository of personal effects," items of personal luggage enjoy the full protection of the Fourth Amendment, apparently whether they are seized from automobiles or not. In United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), federal agents who had the greatest measure of probable cause that a footlocker contained marijuana seized the locker without

a warrant as it was being loaded into a parked car. The Court held that the subsequent warrantless search of the locker at the scene was unconstitutional, as no exigency obtained since the locker was under the agents' exclusive control and was not in any danger of being spirited off by the defendants. The government, however, did not attempt to invoke the "automobile exception."

Subsequently, in Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct., 2586, 61 L.Ed.2d 235 (1979), officers had probable cause to stop a vehicle and seize a suitcase from the car's trunk; they then opened the unlocked suitcase at the scene and found contraband. The Court, in negating this action and refusing to extend "Carroll and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully

stopped by the police" (emphasis added), held that the mere exigency of mobility attendant to automobiles would not be sufficient in itself to justify the search at the scene of personal luggage where the officers had control of the items and could secure a warrant at some later time. But, as the Court explained in a footnote, the Sanders decision in quite limited:

> "Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant . . . Our decision in this case means only that a warrant generally is required before personal luggage can be searched . . . ."

Our examination of the facts convinces us that the duffel bags in appellants' car

were not a "repository of personal effects" within the ambit of Sanders, given that they had been purchased only a short time before, and were quite obviously stuffed with "brick" shaped objects, giving the indication of anything but personal effects. We hold that it was proper for the officers to search the bags immediately rather than waiting for a warrant. Cf., United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) ["scrabble box taped shut]; State v. Heberly, 120 Ariz. 541, 587 P.2d 260 (1978) [ice chest]; Wyss v. State, 262 Ark. 502, 558 S. W.2d 141 (1977) [tool box]; Cooper v. Commonwealth, 577 S.W.2d 34 (Ky.App. 1979) [electric razor box taped shut]; State v. Guzman, 362 So.2d 744 (La. 1978), cert. denied, 443 U.S. 912, 99 S.Ct. 3103, 61 L. Ed.2d 876 (1979) [paper bag]; State v. Johnson, 277 N.W.2d 346 (Minn. 1979) [paper bag].

This is not to say that a duffel bag could never be such a personal item deserving of the protection mandated by Sanders, but under these particular circumstances it was evident that appellants by their actions did not intend to elevate the status of this item to that of a suitcase or other such personal luggage.

We have carefully reviewed the record and the arguments summitted on this issue and conclude that, based upon the above reasoning and authorities, the trial court correctly overruled appellants' motion to suppress the evidence of the drugs seized both from the back seat and trunk of their car. In deciding as we have that the seizure of the duffel bags was made with probable cause and exigent circumstances, we do not reach appellants' further contentions that the seizure was not incident to arrest or the product of a legitimate

inventory.

(Balance of opinion omitted because of extreme length and irrelevancy of omitted portion to present petition.)

Office-Supreme Court, U.S.
FILED
MAY 13 1983
ALEXANDER L. STEVAS,
CLERK

CASE NO. 82-1730

IN THE
SUPREME COURT OF THE UNITED STATES

PRESENT TERM 1983

GERALD LEN VOGEL,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

APPENDIX VOLUME II

FRANK W. RIGGS
ATTORNEY AT LAW
P. O. BOX 1047
MONTGOMERY, ALABAMA 36102
205/834-6990
COUNSEL FOR PETITIONER

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CERTIFICATE OF COUNSEL

I, Frank W. Riggs, a member of the bar of the Supreme Court of the United States, hereby certify that, although the Supreme Court of Alabama has issued certain orders in this case dated July 23, 1982, there orders were never released by said Court and furnished to counsel for the parties, and counsel for the parties had no notice of any such orders, until on or after Februrary 11, 1983, when said Court issued an order entitled "On Application For Second Rehearing." That said orders were not published at the time of their entry is evidenced by the fact that the certificate of the clerk of the Supreme Court on said orders is dated March 2, 1983.

Done this 11 day of May, 1983.

Frank W. Riggs

FRANK W. RIGGS
Attorney for Petitioner

Sworn to and subscribed
before me this 11 day of
May, 1983.

Joan L Dick

NOTARY PUBLIC

July 23, 1982

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

SPECIAL TERM 1982

80-168
Ex Parte: State of Alabama, Ex Rel. Attorney General
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Gerald Len Vogel and Robert Louis Vogel vs. State of Alabama)

WHEREAS, on April 29, 1981, a Writ of Certiorari to the Court of Criminal Appeals was granted by this Court, and the cause was set down for submission pursant to Rule 39, Alabama Rules of Appellate Procedure.

WHEREUPON, come the parties and the Petition for Writ of Certiorari being submitted on briefs and duly examined and understood by the Court, it is considered by the Court that the writ heretofore issued should be quashed and

the petition should be denied.

IT IS, THEREFORE, CONSIDERED AND ORDERED that the Writ of Certiorari heretofore issued to the Court of Criminal Appeals be, and the same is hereby, quashed, and the Petition for Writ of Certiorari be, and the same is hereby, denied. NO COSTS TAXED.

OPINION BY ADAMS, J.
TORBERT, C.J., MADDOX, ALMON, SHORES AND BEATTY, JJ., CONCUR.
FAULKNER, JONES AND EMBRY, JJ., CONCUR SPECIALLY.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 2nd day of March, 1983.

/S Dorothy F. Norwood
Acting Clerk, Supreme Court of Alabama.

JULY 23, 1982

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

SPECIAL TERM 1982

80-175

Ex Parte: Robert Louis Vogel and Gerald Len Vogel
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Gerald Len Vogel and Robert Louis Vogel vs. State of Alabama)

IT IS ORDERED that the application for rehearing filed in the above cause be, and the same is hereby, granted.

IT IS FURTHER ORDERED that the judgment of this Court entered on September 18, 1981 be, and the same is hereby, vacated and the opinion withdrawn and the opinion delivered today substituted therefor.

IT IS FURTHER ORDERED that the

judgment of the Court of Criminal Appeals entered on October 28, 1980 be, and the same is hereby, affirmed, on the issue of search and seizure, at the costs of the petitioners, Robert Louis Vogel and Gerald Len Vogel, for which costs let execution issue.

OPINION BY ADAMS, J.
TORBERT, C.J., MADDOX, ALMON, SHORES AND BEATTY, JJ., CONCUR.
FAULKNER, JONES AND EMBRY, JJ., CONCUR SPECIALLY.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 2nd day of March, 1983.

/S Dorothy F. Norwood
Acting Clerk, Supreme Court of Alabama.

FEB 11 1983

80-168 - Ex parte: State (Re: Vogel v. State)

80-175 - Exparte: Vogel (Re: Vogel v. State)

ON APPLICATION FOR SECOND REHEARING

The opinion of this Court of July 23, 1982, is extended for the purpose of clarification. This Court granted two petitions for certiorari, one filed by the defendants and one filed by the State. The opinion of this Court of July 23, 1982, is directed to the petition of the defendants, and on review by the court's determination of the search and seizure issue. The State's petition for certiorari was granted so that this Court could consider the question whether the simultaneous possession of

several types of drugs, where the facts of possession occurs at the same time and in the same place, constitutes multiple possession offenses; that writ of certiorari was quashed on July 23, 1982, as improvidently granted.

OPINION EXTENDED: APPLICATIONS FOR REHEARING OVERRULED.

All the justices concur.

Office - Supreme Court, U.S.
FILED
MAY 14 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1730

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

GERALD LEN VOGEL,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT OF
CRIMINAL APPEALS OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE WRIT

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON III
ASSISTANT ATTORNEY GENERAL

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250 Administrative Building
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ATTORNEYS FOR RESPONDENT

NO. 82-1730

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Where police officers observe a party committing the offense of littering and incident to informal questioning prior to arrest, the party states that he had been engaged in dumping trash before the officers arrived, do the officers have reasonable cause to arrest the party for littering and search his vehicle at the scene for evidence of littering?

2. Where officers have reasonable cause to believe that a party is violating the laws against littering and that the party's vehicle contains evidence of the same, does a belief on the part of the officers that the party is engaged in violation of the drug laws in addition to littering, limit the officers' authority to search the party's vehicle?

PARTIES

In the Circuit Court of Montgomery County, Alabama, the Court of Criminal Appeals and Supreme Court of Alabama the parties were: Robert Louis Vogel, who is not a party herein; Gerald Len Vogel, who is Petitioner herein and the State of Alabama, which is Respondent herein.

The matters at issue here were first placed in issue in the Circuit (trial) Court and have been at issue throughout this litigation.

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OPINIONS BELOW

The decision and opinion of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction is reported as follows:

Vogel v. State, 426 So. 2d 863 (Cr. App. Ala., 1980)

On September 18, 1981, the Alabama Supreme Court reversed the above opinion of the Court of Criminal Appeals of Alabama and held that the search of the Petitioner's vehicle was illegal under this Honorable Court's decision and opinion in Robbins v. California, (453 U.S. 520, 69 L. Ed. 2d 744, 101 S. Ct. 2841 [1981]). This September 18, 1981, decision and opinion of the Alabama Supreme Court was subsequently withdrawn and is not reported.

The decision and opinion of the Supreme Court of Alabama withdrawing its

September 18, 1981, decision and opinion and affirming the Court of Criminal Appeals' decision is reported as follows:

> Ex parte: Vogel; In re Vogel v. State, 426 So. 2d 882 (S. Ct. Ala., 1982)

JURISDICTION

The Petitioner has invoked this Honorable Court's Jurisdiction under 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing an alleged claim under the Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Robert Louis Vogel and the Petitioner, Gerald Len Vogel, (hereinafter referred to as "The Vogels") were indicted for fourteen (14) separate violations of the Alabama Uniform Controlled Substances Act.[1] Title 20, Section 20-2-70(a), Code of Alabama, 1975. They were convicted in the Circuit Court of Montgomery County, Alabama, of eleven (11) different violations and appealed to the Court of Criminal Appeals of Alabama. Vogel v. State, 426 So. 2d 863, 866 (Cr. App. Ala., 1980)

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[1]They were each indicted in fourteen counts for possession of (1) Pethidine; (2) Methaqualone, (3) Cocaine; (4) Morphine; (5) Hydromorphone; (6) Ambarbital & Secobarbital; (7) Opium; (8) Methadone; (9) Amphetamine; (10) Ethylmorphine; (11) A preparation of opium; (12) Phenmetrazine; (13) Alphaprodine, and (14) Oxymorphone. (R. pp. 222-229) They were convicted under counts 1, 2, 3, 4, 5, 8, 9, 10, 12, 13 and 14. (R. pp. 244-245)

On October 28, 1980, the Honorable Court of Criminal Appeals of Alabama issued an opinion holding.

1. The searches of the Vogels' vehicle and duffle bags were lawful and

2. The violation of the Alabama Uniform Controlled Substances Act with regard to different substances in the same transaction constituted only one offense.

The Circuit Court's Judgment was affirmed in part and reversed in part. Vogel v. State, 426 So. 2d 863 (Cr. App. Ala., 1980).

Both parties applied for rehearing and certiorari. The Court of Criminal Appeals denied both Rehearing Applications, but the Honorable Supreme Court of Alabama granted both petitions. On September 18, 1981, the Supreme Court of Alabama issued its original opinion

in this case, finding the warrantless search of the Vogels' duffle bags illegal under Robbins v. California, (453 U.S. 420, 69 L. Ed. 2d 744, 101 S. Ct. 2841 [1981]) and reversing the decision of the Court of Criminal Appeals. (Vogel v. State, unreported, Mns. op. Sept. 18, 1981)

The State of Alabama applied for rehearing and, when this Honorable Court granted certiorari in United States v. Ross, (454 U.S. 891, 70 L. Ed. 2d 205, 102 S. Ct. 386 [1981]), suggested that the case be held in abeyance until a decision was rendered in Ross. On July 23, 1982, less than two months after this Honorable Court's decision in United States v. Ross, (____ U.S. ____, 72 L. Ed. 2d 572, 102 S. Ct. ____ [1982]), the Alabama Supreme Court granted rehearing, withdrew its September 18, 1981, opinion,

and affirmed the judgment of the Court of Criminal Appeals. Vogel v. State, 426 So. 2d 882 (S. Ct. Ala., 1983).

The State's second application for rehearing raising an unrelated state law issue was overruled on February 11, 1983. (Ibid.)

STATEMENT OF THE FACTS

The following is a brief digest of the facts found by the Court of Criminal Appeals of Alabama.

On May 30, 1979, two Montgomery City Police Officers on routine patrol on Allenport Road noticed an automobile parked near an unused airstrip in a largely unpopulated area. As the officers approached the automobile, they observed two persons, later identified as the Vogels, doing something in the open trunk of their automobile.

Petitioner, Gerald Vogel was seen throwing a plastic bag to the ground, and Robert Vogel slammed the trunk shut in an obvious effort to keep the officers from seeing its contents. Incident to informal questioning prior to arrest, the Vogels stated that they had intended to illegally dump some trash but would not do so in the presence of the officers. The only trash observed by the officers was the bag discarded by Petitioner Gerald Vogel. There were signs prohibiting the dumping of trash in the area. Several new duffle bags filled with rectangular shaped objects were observed in open view in the back seat area of the Vogels' car. An inquiry at a nearby supply store revealed that the Vogels had just purchased these duffle bags as well as several others which were unaccounted for. Although the officers

arrested the Vogels for littering, they believed that the duffle bags contained either brick marijuana or stolen property which had arrived by or which was intended to be flown out from the air strip. An investigator summoned to the scene knew of Robert Vogel's reputation for involvement in drugs and stolen property. The Vogels were arrested and the vehicle was searched. The trunk was found to contain the unaccounted duffle bags. All of the duffle bags contained, not marijuana but stolen controlled substances. (Vogel v. State, 426 So. 2d 863, 866-871 [Cr. App. Ala., 1980])

ARGUMENT

THE OFFICERS HAD PROBABLE CAUSE TO SEARCH THE VOGEL'S VEHICLE.

If the officers in this case had probable cause[2] to search the Vogel's automobile, then they were authorized to open the trunk and the duffle bags. United States v. Ross, ____ U.S. ____, 72 L. Ed. 2d 572, 102 S. Ct. ____ (1982) Recognizing this, the Petitioner seeks to invalidate the search by attacking the events leading up to the arrest and search. The Petitioner seeks to apply the doctrine of "stop and frisk" and argues that the officers did not legally stop the Vogels.

2"...[P]robable cause, that is, ...a belief, reasonably arising out of circumstances known to the seizing officer...." Carroll v. United States, 267 U.S. 132, 149, 69 L. Ed. 543, 549, 45 S. Ct. 280 (1925), quoted with approval in United States v. Ross, ____ U.S. ____, 72 L. Ed. 2d 572, 581, 102 S. Ct. ____ (1982)

The officers did not stop the Vogels at all; they were already stopped. The officers did approach the Vogels in a public place but in so doing the officers did nothing that any citizen was not authorized to do. Before the officers reached the spot, they observed Petitioner Gerald Vogel discard a plastic bag. Thus, the officers had not merely "reasonable suspicion" that unlawful littering was afoot but had actually seen it in progress. Although they were authorized to do so, the officers did not arrest the Petitioner or his brother at that point.[3] They made informal inquiries of the brothers and were advised that the Vogels were engaged in dumping trash. An admission against

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[3]There is, of course, no right to be arrested. Hoffa v. United States, 385 U.S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966)

interest even by a third party justifies belief in the matter asserted. United States v. Matlock, 415 U.S. 164, 176-177, 39 L. Ed. 2d 242, 252-253, 94 S. Ct. 988 (1974); United States v. Barfield, 507 F. 2d 53, 58 (5th Cir., 1985); United States v. Goley, 502 F. 2d 182, 186 (8th Cir., 1974) Therefore, the officers had probable cause to arrest both brothers for illegal littering.

Now if the Vogels were dumping trash as they claimed, the trash had to be in their automobile, since there was no place else it could be. Therefore, the officers had probable cause to search the car, all of its compartments and containers for evidence of littering. United States v. Ross, above.

But, argues the Petitioner the officers suspected the presence of drugs. A search may not be based on suspicion,

but it is difficult to see how a search, which is legal because of probable cause to believe that "x" is present, becomes illegal if the presence of "y" is suspected in addition to "x". It must also be observed that these officers had probable cause to search for drugs.

The Vogels were parked near a seldom used air strip, suitable for illegal drug traffic. They acted in a furtive manner as though they had something to hide, yet readily admitted illegal trash dumping. They had purchased new duffle bags and filled them with something. That "something" had the shape of brick marijuana and was not likely to be trash. This, coupled with Robert Vogel's reputation, would have provided a magistrate with sufficient probable cause to issue a warrant for the automobile and especially the duffle bags. Therefore,

the officers were authorized to conduct such a search under United States v. Ross, ____ U.S. ____, 72 L. Ed. 2d 572, 594, 102 S. Ct. ____ (1982)

The decisions and opinions of the Alabama Courts are entirely consistent with those of this Honorable Court.

CONCLUSION

In conclusion the State of Alabama, Respondent, respectfully submits that the decisions and opinions of the Alabama Courts are patently correct and entirely consistent with the decisions of this Honorable Court and that the writ is due to be denied and the Respondent prays such denial.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENT

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Respondent, do hereby certify that on this _____ day of_____, 1983, I did serve the requisite number of copies of the foregoing on the Attorney for Gerald Len Vogel, Petitioner, by mailing same to him, first class postage prepaid and addressed as follows:

Hon. Frank W. Riggs
Attorney at Law
P. O. Box 1047
Montgomery, Alabama 36102

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL